Nos. 21,824 and 21,824-A

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

JOE R. RAMOS and MARY RAMOS,
Appellees and Cross-Appellants.

On Appeal from the Judgment of the United States District Court for the Northern District of California

BRIEF FOR APPELLEES AND CROSS-APPELLANTS

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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SECTION I

REPLY BRIEF FOR APPELLEES

OPINION BELOW

The memorandum opinion and order of the United States District Court for the Northern District of California (I-R. 50-72) and the amendment thereto (I-R. 73-74) constitute the findings of fact and the conclusions of law of the trial Court. The trial Court's opinion has been officially reported in 260 F. Supp. 479.

JURISDICTION

Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

Appellees and cross-appellants present the following questions:

1. Whether the findings of fact and conclusions of law of the trial Court are supported by substantial evidence that valid partnerships were in existence during the calendar years 1956 and 1957.

2. Whether or not the gifts to the children of a 25% interest each in the "crops business" and which interest was contributed by the children to the 1956 partnership, together with the services rendered to the 1956 partnership by the children, constituted a sufficient capital contribution and performance of service as to preclude re-allocation of income pursuant to the provisions of 704(e)(2) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

Please refer to Appendix A, Appellant's Opening Brief.

PRELIMINARY STATEMENT

This is a bifurcated appeal. Bifurcated, in the sense that the Government seeks to overturn the trial Court's finding of fact and judgment on the assertion that no valid partnerships for the years 1956 and 1957

existed between the members of the Ramos family. Appellees and cross-appellants seek a reversal from that portion of the judgment wherein a rental is charged against the 1956 partnership and added to the 1956 income of cross-appellants. Additionally, the cross-appellants seek a reversal of the trial Court's determination that the $70,640.48 paid to the partnership in 1956 by Rosenberg Bros., for the balance due on the agreement of sale of the 1955 crop, was not partnership property but should be taxable solely to cross-appellants.

Throughout this brief, for identification purposes, we will refer to the defendant and appellant as the "Government"; and the plaintiffs, appellees and cross-appellants, Joe R. Ramos as the "father", and Mary Ramos as the "mother". Joe S. Ramos is referred to as the "son"; and Dolores Donaldson as the "daughter".

This brief is divided into two separate sections:

Section I treats with appellees' contentions that the trial Court's findings as to the existence of valid partnerships for the calendar years 1956 and 1957 are correct and more than amply supported by the record; and that the Government's contention as to its theory of "re-allocation" has no foundation in the record facts or in law.

Section II treats with questions and specifications of error raised by cross-appellants' cross-appeal as hereinbefore set forth.

We concur with the Government's statement that "the basic facts are virtually undisputed as supported

by the record evidence", *insofar as the facts relating to the existence of a 1956 and 1957 partnership.* (II-R. 54, 217 and 218.)

The Government openly and frankly concedes that the evidence supports the findings and that a family partnership was in existence for the calendar years 1956 and 1957. (Government's opening brief, page 3, under heading "Statement".) It is also of interest to note that there was little or no cross-examination of appellees' witnesses. Also worthy of note is that all of the exhibits received in evidence were offered by appellees, save and except one exhibit (Government's Exhibit "A"), which was at the outset offered by appellees, but at the Government's request (II-R. 185) was admitted as the Government's sole and only exhibit.

These two actions were ordered consolidated for a Court trial. By these actions plaintiffs sought income tax refunds. Action No. 40202 (hereafter referred to as the 1956 tax case) sought a refund of Fifty seven Thousand Nine Hundred Two and 93/100 ($57,902.93) Dollars and interest in the amount of Eight Thousand Eight Hundred Ninety Four and 84/100 ($8,894.84) Dollars plus interest at six per cent (6%) per annum as allowed by law. Action No. 40033 (the 1957 tax case) sought a tax refund of Fifty Thousand Four Hundred Fifty Eight and 31/100 ($50,458.31) Dollars plus interest as allowed by law. The plaintiffs in the trial Court, asserted:

(1) that a family partnership was created and came into being in 1955;

(2) that a family partnership was in existence and operation for the tax years 1956 and 1957 and that proper partnership returns were made for these two years;

(3) that the 1956 partnership consisted of plaintiffs and their adult children, Dolores Donaldson, their daughter, and Joe S. Ramos, their son;

(4) that the personnel of the 1957 partnership consisted of the plaintiff, Joe R. Ramos, and their adult children; (Mary S. Ramos, the wife and mother, not being a member of the 1957 partnership);

(5) that the partnership was valid for all purposes;

(6) that the Internal Revenue Service improperly refused to recognize this partnership for these years and has improperly and unlawfully assessed the entire taxable income received from certain farming activities to the plaintiffs alone.

As the result of the trial, the documentary evidence offered and received, the testimony adduced, and the stipulations entered into, there is no substantial factual conflict. For all practical purposes the record presents matters of law arising from what is practically an agreed statement of facts. All of the evidence in the case, oral and documentary (save and except the Government's Exhibit "A"), was presented by the appellees. At the Government's request, all witnesses were ordered excluded from the Court room during the taking of testimony. At the conclusion of the appellees' case the Government *rested*[1] and did not see

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fit to offer any defense either by way of contradictory oral testimony or further documentary evidence. Nor did the Government move for a dismissal, evidently being satisfied that appellees had established their case. It is significant in this connection, and we direct attention to the fact, that the farming and business activities of the partnership, as well as the acts and conduct, both business and personal, of the individuals involved, have been under the close scrutiny and energetic and continuous investigation of government tax agents and investigators since December 1958. (Pltfs. Ex. No. 50.) Also of significance and emphatic note is the Government's frank and open concession that the testimony of the four witnesses, Ruben Lopez (II-R. 367-373), Charles Huff (II-R. 373-379), Frank Molina (II-R. 379-383) and Sam Silvey (II-R. 383-390), as to their knowledge of the formation, conduct and existence of the 1956 family partnership *"is fairly truthful."* (II-R. 390a.)

At this point it is not amiss to direct attention to *Nicholas v. Davis,* 204 F. 2d 200-202 (a tax refund case) wherein the Court expressed itself in connection with a similar record as follows:

> "When controlling, positive, and uncontradicted evidence is introduced, and when it is unimpeached by cross-examination or otherwise, is not inherently improper (improbable), and no circumstance reflected on the record casts doubt on its verity, then under the principles laid down in *Chesapeake & Ohio Ry. Co. v. Martin,* 283 U.S. 209, 215-220, it may not be disregarded, *even though adduced from interested witnesses,* and no

question of credibility or issue of fact is presented for determination by the jury."

See also:

Pence v. U.S., 316 U.S. 332, 339, 340;

Alameda Title & Trust Co. v. Millsap, 71 F. 2d 518, 520;

S.F. Assn. for Blind v. Industrial Aid, 152 F. 2d 532, 536.

STATEMENT OF FACTS

(A) The Partnership Background.

Joe R. Ramos was born in Spain and came to the United States just before his sixteenth birthday in 1925. He is a man of no formal education; his total schooling in Spain was five months; his schooling in the United States consisted of about a month's study in preparation of his application for citizenship, which was granted to him in *1950* or *1951.* In 1931 he married Mary S. Ramos at Auburn, Placer County, California. Both of their children were born in Loomis, Colusa County; their daughter Dolores Donaldson on November 15, 1931, and their son, Joe S. Ramos on September 17, 1934.

Joe R. Ramos began his own farming operations in 1932 in Colusa County. His farming activities consisted generally in the raising and marketing of corn, rice and wheat crops. He ceased his farming activities in Colusa County by reason of the purchase of a 219 acre almond ranch at Winters, California. This ranch has been referred to as the "Ramos Home Ranch" or

the "Home Ranch." At the time of the purchase in late 1943 or early 1944 he established the family home at the Winters ranch. At this time Dolores was about twelve and a half (12½) years of age, and Joe S. Ramos was about nine (9) years of age. Both children finished their grade schools in the Winters area. Thereafter the children attended the local high school at Winters. Upon the completion of the regular high school course, both Dolores and Joe S. Ramos were in regular attendance at and graduated from Sacramento Junior College—Joe S. Ramos in June 1955.

If there is any one particular fact in this case, which has been proved beyond the peradventure of doubt, it is the fact that it was the definite intention, understanding and avowed purpose that when the son reached his twenty-first birthday that a family partnership would come into being. (II-R. 19, 145, 154, 426-427). Such idea and purpose was acted upon as early as the year 1946 when Joe R. Ramos sought the advice of his then attorney, Mr. Ford, of Colusa County, as to the wisdom and propriety of forming a family partnership with his wife and children (II-R. 13).

The record, without the slightest contradiction, evidences the fact that this long-nurtured ambition, purpose and intent was entertained by both the parents and the children. It is clearly reflected in uncontradicted testimony that both children during their early years, worked year in and year out at ranch and farming chores at both the Colusa ranch and the home ranch at Winters (II-R. 10). As they progressed in

years, maturity and ability, they were responsible for and took on more and more of an active participation in the various ramifications of farm work in and about the ranch and the crops (II-R. 10). The record shows that while Dolores was in high school she began to learn bookkeeping in connection with the books of account and records of the ranch (II-R. 11). She was tutored in this work by Mr. Beverly Laugenour, the certified public accountant who for many years was in charge of the books of account and responsible for the tax returns of Mr. and Mrs. Joe R. Ramos (II-R. 11). Later, and when she was a partner with her father in the building company of Ramos & Albecete, she likewise performed bookkeeping services for that company. This was consistent and in line with the end result that when the family partnership came into being and was in operation that Dolores would have had the necessary training, experience and competence to handle and serve as the partner in charge and control of the firm's books of account and records (II-R. 11).

Correspondingly true is the crystal clear picture depicted by the record of the careful training that the son received at the hands of his father in preparation for his eventual work as the "outside" partner. Young Ramos' many years of apprenticeship were not confined to mere menial farm chores. To the contrary, he was meticulously and patiently instructed and trained by his father as to the practical aspects and basic intricacies concerning the complete operation and management of almond ranching activities; ac-

tivities relating to the planting, care and production of crops, particularly almond crops; for example, he was shown how to shape up young trees (II-R. 421), how trees should be cut on the south side so as to balance out the tree (II-R. 421), how to plant trees (II-R. 421), the proper time for spraying (II-R. 421), the pruning of trees, the detail with reference to land contours (II-R. 423), the placing of markers on given trees indicating the direction of levees (II-R. 423), matters pertaining to pollinization (II-R. 423). Important also was the training that he received from his father in connection with the hiring and recruiting of field workers for crop harvesting (II-R. 27). The witness, Ruben J. Lopez (II-R. 372), depicts this phase of the young man's training by his recitation of the facts in connection with the July 1955 trip of young Joe S. Ramos, conversant in the Spanish tongue, and his father to Mexico, in the company of Mr. Lopez, for the sole and definite purpose of hiring and recruiting harvest workers for the 1955 almond crop. Mr. Lopez likewise testified, that the hiring of foreign national farm workers in connection with crop harvesting activities was the most important part of the ranch operation because it had to do with the actual harvest of the crops.

Highly expressive of the purpose, meaning and intent of this training is significantly stated in the following testimony of the son:

> "Q. ——Do you recall his saying anything to you, why he was taking the pains to show you these various things?

A. Yes.

Q. Why? What did he say to you?

A. He said he was going to make me a partner when I turned 21.

Q. *Make you a partner when you reached 21?*

A. *So he was teaching me.*" (II-R. 421)

And again at pages (II-R. 424-425) young Ramos testified:

"Q. At the time that you graduated from college and just prior to your 21st birthday, did you consider as a result of the years on the ranch and the instruction at the hands of your father and other matters, that you were an experienced almond farmer?

A. Yes, I did.

Q. Did you feel that you could take your place upon the ranch and operate it?

A. Yes, I did.

Q. And after you reached your 21st birthday, did you operate the ranch?

A. Yes, I did.

Q. Did you supervise men and give orders and tell people what to do?

A. Yes, I did." (II-R. 424-425)

It is not open to question that on numerous occasions the subject of a family partnership was discussed by and among members of the family, and that these discussions became more numerous and pointed as Joe S. Ramos neared his twenty-first birthday. Likewise, we do not believe it will be disputed that the finalizing of the agreement to form the partnership actually took place about the time Joe S. Ramos graduated from Sacramento Junior College in June

1955. In this connection it is to be remembered that immediately upon graduation he went to work on a full-time basis at the home ranch in connection with the 1955 crop and, because of his draft status, he entered the United States Navy, but not until November 1955, at a time when the 1955 crop had been completely harvested and the lands prepared for the 1956 crop. (II-R. 26)

We feel that the Court will not be insensitive to the plain and legitimate inferences which may properly be indulged in and drawn from the record in this case; legal inferences which compel the conclusion and establish the fact that the Ramoses are an affectionate, closely-knit, loyal and harmonious family. It is the "old country" type of family of halcyon days; the type of family where the father is the actual, and not the titular, head of the family; where the virtues of filial respect, obedience and industry are the daily way of life; where the good things of life are worked for, nurtured and preserved; and where the ultimate end of fruitful endeavors is the enjoyment of their natural passage from the parents to the children—"eventually that someday they would take over the complete management themselves, the children." (II-R. 515)

As the result of our legal research we are satisfied that the ultimate fact as to the existence and operation of a valid family partnership for the years in question may be properly resolved and decided in accordance with the principles enunciated in *Commissioner v. Culbertson,* 337 U.S. 733, 93 L. Ed. 1661,

decided in 1949. The yardstick by which the trial Court is to admeasure the "family" partnership is set forth at page 742 of the Chief Justice's opinion, where it is declared:

> "The question is *not* whether the *services* or *capital* contributed by a partner are of sufficient importance to meet some *objective* standard supposedly established by the Tower Case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—*the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.*"

We assert that the record in the instant case amply meets the test laid down by the *Culbertson* case. In the words of the Supreme Court, "There is nothing new or particularly difficult about such a test." We shall, therefore, proceed to analyze the record in Ramos in light of the tests set forth in *Culbertson.*

(B) The 1956 Partnership.

The partnership in existence and operating the almond ranch at the "Home Ranch" in 1956 was composed of the plaintiffs, Joe R. Ramos and Mary S. Ramos, husband and wife, and the mother and father of Mrs. Dolores Donaldson, their daughter, and Joe

1955. In this connection it is to be remembered that immediately upon graduation he went to work on a full-time basis at the home ranch in connection with the 1955 crop and, because of his draft status, he entered the United States Navy, but not until November 1955, at a time when the 1955 crop had been completely harvested and the lands prepared for the 1956 crop. (II-R. 26)

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(B) The 1956 Partnership.

The partnership in existence and operating the almond ranch at the "Home Ranch" in 1956 was composed of the plaintiffs, Joe R. Ramos and Mary S. Ramos, husband and wife, and the mother and father of Mrs. Dolores Donaldson, their daughter, and Joe

S. Ramos, their son. This partnership was the product and culmination of the definite and often expressed intent that the Ramos family would engage in the farming business as a family partnership when Joe S. Ramos, the son, reached his twenty-first birthday. (II-R. 16-17, 19) No serious question may properly be raised as to the good faith or the intention and determination of the Ramos family to engage in the farming business as a family partnership, as such was the avowed intent and ultimate goal of this family. Nor may it be questioned that both the intent and the goal became an accomplished fact. This family partnership commenced its farming functions for a business purpose in 1955 to become effective January 1, 1956. It operated on a cash and calendar year basis.

The negotiations leading up to this partnership, and the partnership agreement itself, were entirely oral. The parties did not reduce their agreements to writing; they did not formalize their understanding and intentions by any written instrument because they had been led to understand that a good and sufficient partnership could be created without the necessity of documentation or other written formalities. As expressed by the father: "——we understand we don't have to have paper between the family." (II-R. 69)

We believe the Court throughout the trial had carefully scrutinized the witnesses and in particular had paid careful attention to the testimony of those members of the Ramos family and had observed the manner in which these witnesses gave their testimony. We

likewise believe that the Court concluded that these witnesses were candid and sincere;—reliable and truthful. We likewise are satisfied that the Government will readily concede that the testimony given by these particular witnesses was truthful.

Perhaps the most expressive statement of the existence and operation of the 1956 partnership is to be found in the testimony of Mrs. Dolores Donaldson as elicited on cross-examination:

"Q. That is essentially all he gave you on the ranch in '56, wasn't it, just an interest in the profits?

A. No.

Q. What was your interest? You didn't own land, did you Mrs. Donaldson, or any interest in the land?

A. No, we don't own the land.

Q. You don't own any interest in the machinery?

A. No.

Q. There was no cash capital put into the partnership in '56?

A. No.

Q. Well, what was your twenty-five per cent interest in 1956?

A. *In the partnership agreement. When we formed it we were going to be partners, were going to be a family partnership, all together, and whatever income we made we would share.*

If we had losses, we would share them and we would pay our expenses, and whatever was left we could share twenty-five per cent, my father, my mother, my brother and I. I don't think you have to own land to have a share in anything.

Q. In other words, you feel you can participate in the profits from the land without owning any portion of the land?

A. Yes.

Q. And this is the type of partnership interest that you had, just in the profits generated by the assets?

A. *Profits or losses that would be produced by the almond trees on the land.*" (II-R. 301-302)

The terms of the partnership agreement were carried out in the utmost of good faith, and we believe it self-evident that the members of the 1956 partnership honestly and conscientiously did their very best to conduct the ranch business in accordance with their partnership agreement. The 1956 partnership income tax return was made in accordance with the agreement and the income received by each of the partners for their partnership shares was strictly and accurately accounted for in the individual returns of the respective parties to both the Federal and State governments. The partnership books of account for the year 1956 likewise indicate and reflect the partnership agreement. The testimony of Dolores Donaldson clearly demonstrated that the books were kept in the regular course of business and with the ultimate purpose in mind of having the partnership accounts in such order that a proper partnership tax return could be made covering the calendar year 1956.

It is true that the 1956 partnership lacks the indicia prevalent in a so-called "formalized" partnership; a partnership name was neither adopted nor used and no separate partnership bank accounts were

maintained. However, as above stated, the books of account clearly reflect what were to be considered as partnership items and what were to be considered as items personal to Joe R. Ramos and Mary S. Ramos. It is elementary law that mere indicia of outward manifestation, very often associated with partnerships, is neither material nor controlling with reference to the establishment of a valid intent to form and operate a partnership. If, in truth and in fact, as in this case, the partnership was actually created and was operated in good faith and for a definite business purpose, such is all that the law requires. It is not amiss at this point to reflect and consider that the business operations on the home ranch in connection with the almond crop were not of such magnitude as, for example, might be incurred in a partnership as that of Merrill Lynch, Pierce, Fenner & Smith, or other comparable commercial enterprises filled with the intricacies and complexities inherent in big business.

On the subject of bookkeeping records in connection with *farming* activities, it has been stated in *Britt's Estate v. C.I.R.,* 190 F. 2d 946:

> "As to the bookkeeping records, farming is not a type of business in which elaborate records are usually kept. Nor are the members of a family, when dealing inter se, as likely to observe formalities as strictly as when dealing with others. Spurious agreements, designed to evade taxes, are frequently in better form than genuine ones. The records here kept were adequate and appropriate for the purpose, and present no evidence of distortion or concealment of facts."

As to the physical absence of Joe S. Ramos from actual farming operations during the year 1956 the Court will appreciate that this absence was occasioned solely by circumstances over and beyond the control of young Ramos. He plainly stated the reasons which compelled his Navy enlistment. In answer to a question put to him by the Court as to whether there was any particular reason why he picked the November date to go into the Navy, he answered as follows:

> *"Well, I wanted to help my father, wanted to help finish up the crops before I went in, and also at that particular time the draft was getting —breathing down my neck, too, and the Navy came out with a deal,* all reserve units, it was that, well, if you join now, you have your choice of either Atlantic or Pacific Fleet, and I wanted to get on the Atlantic Fleet." (II-R. 425.)

It will be remembered that at this time young Ramos had completed his education, he was twenty-one years af age, he was unmarried, and he had no physical disabilities. It was obvious that he was immediately available for military draft. Faced with this situation, and in common with the problem confronting such able-bodied men of his age group, he had to make an election as to whether to continue with his present physical partnership activities, with the present call to service hanging over his head, or to meet the situation head-on and discharge his military obligation.

His sister, Mrs. Donaldson, sheds light upon her brother's frame of mind relative to the problem of his military service as disclosed by her testimony:

The Court: May I ask one thing? Do you know when your brother first started to go into the Navy?

The Witness: Well, he was in the Navy Reserve when he was going to high school. And when he was graduating from college, he stated all the time that if he didn't go in right away, the Army was going to draft him and he had to do something. He wanted to get it over with, so he kept repeating that pretty soon he was going to have to do something, that he would have to go in the Navy because he didn't want to go in the Army.

The Court: Do you recall when you agreed, when the family agreed to start this partnership in the beginning of 1956?

The Witness: In the fall, after his birthday, and he decided he was going into the Navy.

The Court: That is what I want to know. When did he decide he was going to go into the Navy, *before or after* you agreed on the family partnership?

The Witness: I think he decided to go in the Navy before.

The Court: Before you decided to form the family partnership? *What is your best recollection?*

The Witness: Well, I really can't remember because we just knew he was going in the Navy all the time, so when the actual date he enlisted is, I don't know.

The Court: Was there any discussion at any time about holding the partnership up until he got back from the Navy?

The Witness: *Oh, no. He was just a partner. If he had to go to the Navy, he had to go, but he was still a partner.* (II-R. 157-158)

Further, it is the uncontradicted record that Joe S. Ramos was not unmindful of his partnership status and that he participated in the operation and conduct of the business as best he was able in view of the circumstances which necessitated his absence from the ranch. He has testified that he was in regular communication by letter correspondence with the members of his family, and in particular with his father and his sister. By means of letter correspondence he gave his counsel and advice, and expressed his views as to definite and material matters affecting the successful operation of the partnership farming activities. Also, it is to be remembered that during the occasion of the visit of his mother, sister and fiancee to the Island of Hawaii where he was stationed, he had made known to them his concerns in connection with the partnership activities, and discussed with them the various farming problems and partnership activities. Also, it is a matter of express statute that a partner is not to suffer penalty, or to have his partnership interest jeopardized, because of absence due to military service. (Internal Revenue Code of 1954, Sec. 704 (e) (2).)

(C) The 1957 Partnership.

The history of the coming into being of the 1957 partnership is essentially a plain and simple one. Mr. Beverly Laugenour was the accountant for many years for Mr. and Mrs. Joe R. Ramos. He had prepared their tax returns from 1943 through 1955. He has stated (Pltfs. Ex. 89):

> "Although aware that a family partnership would be formed when the son, Joe S. Ramos, and daughter, Dolores, were both of age, I took no technical interest in these discussions because there was, in my opinion, no action necessary to accomplish this relationship for the purpose of preparation of income tax returns. I was subsequently informed that the family partnership became operative as of January 1, 1956."

In 1956 the personal affairs of Mr. Laugenour reached the point where he felt that he could no longer handle this particular account. He suggested to the Ramos family that the work be turned over to Mr. George Franzman, another certified public accountant. Mr. Franzman accepted the employment and from then on became the accountant and tax authority for the Ramos family. Mr. Franzman's testimony very clearly reflects the situation concerning the Ramos family affairs in his initial meetings with the members of the family. Summarized the following narrative is unfolded in the record:

He first met the Ramos family at their ranch in Winters. (II-R. 480) When he first went to the ranch with Mr. Laugenour there were present "Joe Ramos, his wife, Mary, and the daughter, Dolores Donaldson." (II-R. 481) On the occasion of his first visit and meeting with these parties he was advised that their business was being carried on as a partnership (II-R. 481); that he was advised that this partnership was composed of Joe Ramos, his wife, his daughter and his son". (II-R. 482) He went well into the

background leading up to the 1956 arrangement, and Mr. Ramos told him that it was a partnership. (II-R. 482) He reviewed with Mr. Ramos "all of these experiences that he had had, consultation with attorneys for many years." (II-R. 482) "He advised me that he had at one time consulted with an attorney in Colusa on this same subject, about the forming of a partnership. The attorney advised him at that time that he did not think it advisable because the children were still minors and he would run into legal guardianship problems, so he advised Mr. Ramos to wait until both children were 21. Dolores Donaldson had reached 21 at that time and Joey was still a minor, so he reached age in 1955. So therefore this would have been the first year of the partnership." (II-R. 483) Generally he was informed that "it was a partnership effective the beginning of the calendar year. The profits after all charges were to be split four ways . . .". (II-R. 483) Mr. Franzman on inquiry found that all of the physical assets were owned by Mr. Joe R. Ramos; the ranch, the trees and the ranch machinery. (II-R. 483) Changes were made with reference to the family operation in the year 1957. (II-R. 486)

Mr. Franzman then gave this significant testimony:

"Q. Yes, and do you know who was instrumental in having that change made?

A. Well, I guess I was.

Q. All right, tell us about that.

A. *Well, one of the first questions I asked all the members of the family, whether there was a written partnership agreement on this, and I*

found out that there was none, so I said, 'Well, in my opinion, we should firm up this a little more. It's fine what's in your heart, yes, it's a partnership within your heart or the heart of each one of you, but for legal purposes we probably should firm it up a little. Something might happen to you, might happen to Joey, Dolores. You don't know, you don't know what you might get involved in.' So I suggested some type of a partnership agreement be drawn up."

According to Mr. Franzman's recollection he first met Joe S. Ramos, the son, after his separation from the military service. (II-R. 415) There had been no discussion that the partnership was to be delayed due to the fact that Joe S. Ramos was in the military service. (II-R. 415)

The Ramos family accepted Mr. Franzman's opinion and advice with the result that the 1957 partnership came into existence on a formalized basis.

The documentary evidence in support of the 1957 partnership offered and received as proof of the so-called "formal" partnership, is to be found in plaintiffs' exhibits numbered and designated as follows:

Pltfs Ex #1. Original of "Partnership Agreement" dated January 5, 1957, between Joe R. Ramos, Dolores Donaldson and Joe S. Ramos;

Pltfs Ex #2. "Memorandum of Rental Agreement", executed by Joe R. Ramos and Company, and signed by Joe R. Ramos, Joe S. Ramos and Dolores Donaldson, and also bearing the individual signature of Joe R. Ramos and Mary S. Ramos;

Pltfs Ex #3. A certified copy of Certificate of Transacting Business Under Fictitious Name of "Joe R. Ramos & Co.", as the same appears of record on file in the office of the County Clerk of the County of Solano, State of California;

Pltfs Ex #4. Affidavit of Publication (duplicate copy) of the foregoing Certificate of Transacting Business Under Fictitious Name;

Pltfs Ex #5. Photostatic copy of signature card of the First National Bank of Dixon, California, of Joe R. Ramos & Co., in connection with a commercial account and savings account, dated March 26, 1957, and signed by Joe R. Ramos and Mary S. Ramos, together with photostatic copy of reverse side of said signature card, showing account opened March 26, 1957 by a deposit of $15,000.00 and a deposit in savings account No. 8737 of $58,441.35 on May 22, 1957, as well as other data;

Pltfs Ex #6. The original books of account and bookkeeping records of Joe R. Ramos & Co.;

Pltfs Ex #7. The original books of account and bookkeeping records of Joe R. Ramos;

Pltfs Ex #8. Bank statements pertaining to the commercial account of Joe R. Ramos & Co. for 1957, with the First National Bank of Dixon, Dixon, California;

Pltfs Ex #9. Cancelled checks drawn on the aforesaid commercial account on said bank, for the year 1957, starting with check No. 1;

Pltfs Ex #10. Book of duplicate deposit slips of Joe R. Ramos & Co. with the First National Bank of Dixon, showing deposits to both commercial and savings accounts of Joe R. Ramos & Co. during the year 1957;

Pltfs Ex #14. Cancelled check No. 624 dated February 14, 1957, drawn on Bank of America, Winters Branch, by Joe R. Ramos, to the order of Dolores Donaldson, in the sum of $38,040.86, bearing endorsement in blank by Dolores Donaldson;

Pltfs Ex #15. Photostatic copy of Cashier's Check, and reverse side thereof, No. 15297, of American Trust Company, Woodland office, dated February 15, 1957, payable to the order of Internal Revenue Service in the amount of $16,028.67 (Dolores Donaldson);

Pltfs Ex #16. Photostatic copy of Cashier's Check, and reverse side thereof, No. 15296, of American Trust Company, Woodland office, dated February 15, 1957, payable to the order of Franchise Tax Board in the amount of $1,160.34 (Dolores Donaldson);

Pltfs Ex #17. Photostatic copy of Cashier's Check, and reverse side thereof, No. 15583, of American Trust Company, Woodland office, dated March 25, 1957, payable to the order of Joe R. Ramos & Co., in the amount of $15,000.00, and bearing endorsement on the reverse side "Joe R. Ramos and Co. by Joe R. Ramos";

Pltfs Ex #21. One sheet containing photostatic copy of check, and reverse side thereof, being Cashier's Check No. 1388425 of Bank of America, Winters Branch, dated March 27, 1957, payable to the order of Joe R. Ramos, in the amount of $15,000.00 (Joe S. Ramos);

Pltfs Ex #25. Cancelled check of Joe R. Ramos & Co., No. 274 dated February 6, 1958, drawn on the First National Bank of Dixon, payable to the

order of Joe R. and Mary Ramos, in the amount of $15,000.00;

Pltfs Ex #26. Cancelled check of Joe R. Ramos & Co. No. 278, dated February 6, 1958, drawn on the First National Bank of Dixon, payable to the order of Joe S. Ramos in the amount of $15,-000.00. Said check bears endorsement in blank of Joe S. Ramos;

Pltfs Ex #27. Cancelled check of Joe R. Ramos & Co., No. 276, dated February 6, 1958, drawn on the First National Bank of Dixon, payable to the order of Dolores Donaldson, in the amount of $15,000.00;

Pltfs Ex #30. Duplicate deposit slip, Commercial Tenplan Account, Bank of America, Winters Branch, dated February 7, 1958, and showing deposit to account of Dolores Donaldson or Junior E. Donaldson of check bearing clearing house No. 90-515, in the amount of $15,000.00;

Pltfs Ex #31. Copy of statement of Commercial Account, consisting of two pages, with Winters Branch, Bank of America, of account in name of Junior E. Donaldson or Dolores Donaldson, and covering the period from January 10, 1958 to July 16, 1958;

Pltfs Ex #33. Copy of U. S. Partnership Return of income for the calendar year 1957 of Joe R. Ramos & Co.;

Pltfs Ex #34. Original of letter dated June 17, 1963 from Harter Packing Company to Duffy, Walton & De Dobbeleer in re Joe R. Ramos & Co.;

Pltfs Ex #36. Employer's copy of Workmen's Compensation Insurance Payroll Report for 1957 of

Joe R. Ramos & Co., signed "Dolores Donaldson, Partner";

Pltfs Ex #37. Copy of Employer's Annual Tax Return for Agricultural Employees for year 1957, prepared by "Dolores Donaldson, partner," for
Joe R. and J. S. Ramos and D. Donaldson
Joe R. Ramos & Co.
Route 1, Box 135
Winters, Calif.
1-1-56;

Pltfs Ex #38. Statement, consisting of two sheets, of Harter Packing Co. in account with Joe R. Ramos & Co. for almond crop purchased and other matters in connection with said transaction re 1957 crops;

Pltfs Ex #39. Invoices, Sam Finegold, No. 18340 and No. 18938 dated 8-14 and bearing stamp showing payment 8-14-57 to Joe Ramos & Co.;

Pltfs Ex #40. Agricultural Employer's Social Security Tax Guide, Circular A, issued by the Internal Revenue Service, U.S. Treasury Department, and addressed to Joe R. and J. S. Ramos and D. Donaldson
Joe R. Ramos & Co.
Route 1, Box 135
Winters, Cal. 94-1398198-A
1-1-56;

Pltfs Ex #55. Photostatic copy of Almond Contract with Harter Packing Co. bearing date of November 26, 1957, consisting of two pages, and signed by "Joe R. Ramos and Co., seller, and Harter Packing Co., buyer, by Sebastian R. Lopez";

Pltfs Ex #57. Check No. 4383 of Harter Packing Co. to the order of Joe Ramos Co., together with

endorsement on the reverse side of said check; check in the amount of $35,000.00;

Pltfs Ex #58. Checks Nos. 4554, 560, 794 and 810, of Harter Packing Co., each payable to the order of Joe R. Ramos & Co., together with endorsements on the reverse side of each check;

Pltfs Ex #60. Photostatic copy of one sheet with reference to Harter Packing Co. account with Joe R. Ramos & Co. in re the 1957 almond crop;

Pltfs Ex #63. Statement of First National Bank, Dixon, California, dated April 9, 1957, debiting the account of Joe R. Ramos & Co. in the amount of $12.43 for check imprinting, and the reverse side showing payment of said sum on said date;

Pltfs Ex #87. Photostatic copy consisting of two pages of ledger sheets or statement of account with the First National Bank of Dixon—Account No. 8737—Joe R. Ramos & Co.—from May 22, 1957 to June 30, 1963.

The record with reference to the proof of 1957 partnership is replete with indicia pointing up the fact that the producing, harvesting and sale of the 1957 almond crop was conducted as a partnership enterprise.

The salient points favorable to the plaintiffs' proof in this connection may be summarized as follows:

1. The partnership operations were conducted in accordance with recognized business practices;

2. Each of the partners made capital contributions of $15,000.00, and that these respective capital contributions were necessary to and were utilized by the partnership in connection with 1957 operations;

3. That the partners, Joe R. Ramos and Dolores Donaldson, each rendered vital services to the partnership in accordance with their previous understandings and agreements and did the work allocated to them;

4. That the partner, Joe S. Ramos, by reason of his military service, was not able to be physically present in connection with the bulk of the 1957 farming operations.

However, in this connection it is to be further noted that immediately upon his discharge on October 4, 1957, which took place at the Receiving Station at Treasure Island, Joe S. Ramos immediately went home to work on the ranch. (II-R. 442) There was no "time-off" nor the taking of any vacation, nor any loss of time from the actual time of discharge to his immediate return to his work at the ranch. He testified that he went right to work *"because we was on the tail end of the almond harvest at the time."* (II-R. 443.) The record in this respect also indicates that he worked continuously on the ranch from October 4, 1957 to the end of the year; a period of three months.

Likewise, it is of importance to note the following testimony of the son in connection with the problem presented as a consequence of his military service.

> "Q. What arrangement or understanding was had with reference to the fact that you were going to be in the Military Service? Everybody was acquainted with that, weren't they?
>
> A. Yes.
>
> Q. All right, was it discussed?

A. Yes, it was.

Q. All right. Well, what was the understanding among the members of the partnership of the effect that this military service was going to have on the partnership?

A. *It wouldn't have no effect at all.*

Q. *Well, let me ask you this. Who was going to do your share of the work?*

A. *It was an understanding that we had, that I had with my father, that he would take care of things while I was gone and when I came back, I would make it up, and then he could take it easy.*

Q. In other words, he was going to work a little harder while you were in the service, is that it?

A. Yes.

Q. And you would try to make it up to him when you got back, is that it?

A. Yes.

Q. *Well, I take it then there was never any intention that the partnership would be deferred while you were in the service or put off until you got back?*

A. *No.*" (II-R. 464-465)

On the subject of military service as affecting a partner's interest, we respectfully direct the Court's attention to the following cases as authorities to the effect that where the intent has been established to form a partnership, the fact of absence from the partnership as a result of military service is of no consequence.

Culbertson v. C.I.R., 168 F. 2d 979;

Seabrook v. C.I.R., 196 F. 2d 322;

Crossley v. Campbell, 87 F. Supp. 862;
Anderson v. Robinson, 115 F. Supp. 776;
Sklarsky v. U.S., 153 F. Supp. 796.

SUMMARY OF ARGUMENT

I. The United States District Court did not err in finding and concluding that valid partnerships existed for the years 1956 and 1957. The record contains substantial evidence to support the findings of fact, conclusions of law and judgment based thereon.

II. There was no basis for any reallocation, for the reason that the clear and uncontradicted record shows that the father and mother had irrevocably divested themselves of their *sole and exclusive* use, enjoyment and control of the lands, trees, equipment and accounts receivable; that they further divested themselves of this sole and exclusive right of use and control of their properties on September 17, 1955, at the time of the creation of the partnership with their children; that this gift to the children of a 25% interest each in and to the crops, business and assets thereof, was a gift of a present business interest and not an assignment of future income. The son and daughter each made capital contributions to the 1956 and 1957 partnerships and rendered substantial and valuable services thereto.

ARGUMENT

I.

THE DISTRICT COURT DID NOT ERR IN ITS FINDING THAT THERE WAS A VALID FAMILY PARTNERSHIP COMPOSED OF TAXPAYERS AND THEIR CHILDREN DURING 1956, AND A VALID FAMILY PARTNERSHIP COMPOSED OF TAXPAYER, JOE R. RAMOS, AND THE CHILDREN DURING 1957.

It is basic appellate law that (1) the Court of Appeals will not re-try the issues of fact or substitute its judgment with respect to such issues for that of the United States District Court. (2) The Court of Appeals will not set aside a finding of fact of the District Court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was adopted by an erroneous view of the law. (3) Full effect will always be given by the Court on appeal to the opportunity which the Federal District Court had to observe witnesses, judge their credibility, and draw inferences from contradictions in the testimony of even the same witness. (4) The power of a Federal District Court to decide doubtful issues of fact is not limited to deciding them correctly. (See *General Casualty Co. of America v. School District No. 5,* 233 F. Rep. 2d p. 526.

The foregoing case is only one of a number of cases decided by this Honorable Circuit and sets forth well known and salutary rules governing appeals. As has heretofore been observed, both in the Government's opening brief and in our brief, the facts of these cases at bar are virtually uncontradicted, and there is no good reason to burden this Court with any further detailed review of the evidence because as ap-

pears the record more than amply supports the trial Court's findings that valid family partnerships were created and were in existence during the calendar years 1956 and 1957. To attempt to hold otherwise would be in effect to endeavor to make new findings of fact without supporting evidence. We respectfully submit on the basis of the sufficiency of the evidence to sustain the trial Court's findings that the record is overwhelmingly in favor of the appellees.

The controlling authority is the landmark *Culbertson* case (*Comm. v. Culbertson,* 337 U.S. 733), and appellees, with propriety could conclude this section of their brief in complete reliance upon the authority of *Culbertson.* However, a great body of case law has stemmed from *Culbertson* and the reading of these cases are both edifying and persuasive. They are the many cases which have dealt with a variety of factual situations concerning family partnerships; all are in consonance with the legal principles established by *Culbertson.*

Accordingly, we wish to be clearly understood that the omission to document these cases in this brief, either by way of quotation, digest or syllabus, has not been prompted by any lack of energy on our part, or with the thought of treating the body of case law in a cavalier manner; rather, it is our considered and respectful opinion that the Court itself would prefer to peruse these cases from the published reports, rather than be burdened in the reading of page after page of close, printed matter setting forth by way of quotation, statement or comment the contents of each

particular case. We feel that this brief should be contained within the boundaries of reasonable page limits. Therefore, we respectfully refer the Court to the following table of authorities wherein we have listed the cases which have decided factual situations comparable to that facing the Ramos family; cases which are in complete harmony with the salutary principles enunciated in *Culbertson.*

Following are the cases referred to:

Alexander v. C.I.R., 194 F. 2d 921 (see footnotes 2-3, pp. 923-924);
Anderson v. Robinson, 115 F. Supp. 776;
Ardolina v. C.I.R., 186 F.2d 176;
Barrett v. C.I.R., 185 F. 2d 150;
Bologna v. Donnelly, 112 F. Supp. 533;
Campbell v. Batman, 239 F.2d 283/285;
Cobb v. C.I.R., 185 F. 2d 255;
Commissioner v. Culbertson, 337 U.S. 733, 93 L. Ed. 1661;
Dorsey Estate v. C.I.R., 214 F. 2d 294/299;
Eisenberg v. Smith, 263 F. 2d 827;
Finlen v. Healy, 187 F. Supp. 434;
First Sec. Bank v. U.S., 213 F. Supp. 372 (affirmed; 9th Cir. June 5, 1964);
Funai v. C.I.R., 181 F. 2d 390;
Ginsberg v. Arnold, 185 F. 2d 913;
Greenberger v. C.I.R., 177 F. 2d 990;
Henslee v. Whitson, 200 F. 2d 538, 540;
Jones v. Baker, 189 F. 2d 842;
Jones v. Trapp, 186 F. 2d 951;
Lamb v. Smith, 183 F. 2d 938;

Larson v. Robinson, 136 F. Supp. 469, 472;
Marcus v. C.I.R., 201 F. 2d 850;
Neil v. C.I.R., 26 F. 2d 563;
Nicholas v. Davis, 204 F. 2d 200;
Norton v. Jones, 97 F. Supp. 500;
Parker v. Westover, 221 F. 2d 603;
Pike v. U.S., 231 F. 2d 688;
Scofield v. Davant, 218 F. 2d 486;
Seabrook v. C.I.R., 196 F. 2d 322, 328;
Sklarsky v. U.S., 153 F. Supp. 796;
Snyder v. Westover, 217 F. 2d 928;
Stanback v. C.I.R., 271 F. 2d 514;
Tomilson v. C.I.R., 199 F. 2d 674;
Vaughn v. Carey, 88 F. Supp. 967, 969;
Visintainer v. C.I.R., 187 F. 2d 519;
Walberg v. Smyth, 142 F. Supp. 293;
Weizer v. C.I.R., 165 F. 2d 772;
Willard v. U.S., 89 F. Supp. 972/975;
Williamson v. U.S., 152 F. Supp. 716.

II.

THERE IS NO BASIS FOR RE-ALLOCATION.

The Government seeks to apply re-allocation principles based upon the theory that the children contributed neither capital nor services to the 1956 and 1957 partnerships. The Government's statement on page 5 of its brief: "The partnership acquired no interest in the land, trees and other improvements which made up the taxpayers' ranch or in the equip-

ment necessary for its operation, as these assets were retained by taxpayers" is shading the truth. The father and mother retained only the bare legal title to the lands, trees and equipment; and 50% of the right of use, occupancy, control, possession and enjoyment of these assets had been irrevocably divested as to the 1956 partnership and was subject to a right of use pursuant to a rental agreement in 1957.

The Government's statement: "The partnership did not pay any rent in 1956 for these assets" is true and correct. It is the uncontradicted evidence that the father and mother received 50% of the *net* profits for the calendar year 1956. This raises the justifiable inference that the mother in 1956 received 25% of the *net* profits in lieu of rent for that year. This inference is further supported by the record because when the 1957 ranch operations are considered, we note, without contradiction that the mother is no longer a partner. In place of her 25% share of net profits there was a rental charge of 25% of *gross* profits, thus increasing the taxable income of the father and mother.

The Government's statement that neither the daughter nor the son contributed any capital to the partnership in 1956 is again unwarranted. The daughter and son having each acquired a 25% interest in and to the "crops business" contributed that 25% interest to the partnership; the "crops business" consisting of the right of use and control of the trees, lands and equipment, together with all accounts receivable of the said business and each of the children then contributed

their said 25% interest in and to the right of use, control, possession and enjoyment of the said lands, trees and equipment and the 25% interest each in and to the accounts receivable of the business during the 1956 partnership. We respectfully submit that the documents representing ownership of the lands, trees, equipment and accounts receivable could of themselves produce nothing. It is the use and control of the lands, trees and equipment and the accounts receivable of the business which produce either profit or loss. These are rights of substantial economic value. The accounts receivable of the business at the time of the creation of the partnership on September 17, 1955 were in the sum of $70,640.48. It is thus apparent that each child in contributing his interest in the account receivable in effect made a capital contribution to the partnership of $17,460.12 each, and that this $17,460.12 contributed by the son and the daughter was commingled with and was actually used in the operation of the ranch. Their contributions, therefore, were of a definite economic value to the partnership.

When the Rosenberg Bros. account receivable in the amount of $70,640.48 was received it was merely a substitution of one capital asset for another capital asset, to-wit, cash, and which cash was (without contradiction and beyond the shadow of a doubt) promptly used in connection with 1956 partnership expenditures. The Government frankly concedes that a gift may be valid so as to relieve the donor from liability of income tax from subsequently accrued income although it was made for the purpose of re-

ducing the donor's income tax. In "Partner and Partnership—Income and Tax"—Barrett & Sego, Vol. 1, page 177, it is stated:

> "Tangible personal property that is owned by a partner may be used by the partnership but without such property thereby becoming partnership property." (This is the exact situation before the Court insofar as the ownership of the almond trees, farm machinery and the land are concerned.)
>
> "The rule with respect to intangible personal property is virtually the same as quoted next above but with this exception—*if such property is of a nature whereby it is consumed or used up and if the proceeds are placed to the same account it may more readily be said to be partnership property.*"

Of further interest in this matter is the case of *Sklarsky v. The United States,* 153 F. Supp. 796. This is a case wherein the Government was contending for a re-allocation. The Court in rejecting the Government's contentions stated:

> "If it were our function or that of the Commissioner of Internal Revenue, to reform the partnership agreements so that they would more exactly attribute income to the partners on the basis of the profit-making capacity of their contributions of capital or services, this might well be a suitable case for doing that. But the function of the Commissioner of Internal Revenue, and of ourselves, is much more limited. It is only to determine, from all the evidence, whether these were real partnerships, or only pretended ones."

In conclusion we respectfully assert that the United States District Court did not err in finding valid partnerships for the years 1956 and 1957 and that there is no basis or foundation whatsoever for re-allocation of income as urged by the Government.

CONCLUSION

It is evident that the record overwhelmingly supports the Court's finding that there were valid family partnerships for the calendar years 1956 and 1957. It is likewise clearly supported by the record that the children did have a capital interest in the assets of the partnership, to-wit, their 25% interest each in and to the "crops business" which included the right to the use, control and enjoyment of the lands, trees and equipment, together with their interest in the Rosenberg Bros. account receivable which was a capital asset of the "crops business". This capital contribution together with the services precludes any re-allocation under Section 704(e) of the Internal Revenue Code.

This brief being bifurcated we will now proceed with Section II of the brief which constitutes the cross-appellants' points on appeal.

INDEX

Brief for Appellees and Cross-Appellants[1]

Section II

Citations: See Table of Authorities, Section I, this brief.

[1]We have omitted in this index to Section II matters pertaining to "Opinion Below"; "Jurisdiction"; and "Statutes and Regulations Involved" for the reason these subjects have already been dealt with in Section I of the brief.

"rent", in face of the uncontradicted evidence that the partners had definitely agreed that no rent was to be paid to appellees for the calendar year 1956. To the contrary, the appellees and their son and daughter had agreed that Mary S. Ramos would receive a 25% share of the net income for 1956 in lieu of rent.

STATEMENT

Inasmuch as this is a bifurcated brief and the questions presented in this section of the brief are interrelated with questions and argument set forth in Section I in appellees and cross-appellants' reply brief and arguments therein, we will endeavor to avoid as much repetition as possible. For a statement herein we respectfully refer this Court to appellees and cross-appellants' statement commencing on page 7 of Section I of their reply brief.

SUMMARY OF ARGUMENT

The resolution of the questions presented herein involve the matter of the determination of the following facts:

(1) The nature and extent of the interest in the ranching business which was given to the son and daughter on the occasion of the twenty-first birthday of the son, Joe S. Ramos, on September 17, 1955, particularly the matter of the $70,640.48 account receivable paid in 1956 by Rosenberg Bros.

(2) The partners having specifically agreed that the 1956 partnership would not pay any rent and that the father and mother would each take a 25% share of the net income in lieu of a rental payment, the District Court erred in finding and concluding that the partnership should be surcharged with 25% of its gross income as an alternative to re-allocation and that Joe R. Ramos and Mary S. Ramos, the father and mother, were chargeable with income tax on such rental allocation.

ARGUMENT

I.

THE ROSENBERG BROS. ACCOUNT RECEIVABLE.

The uncontradicted evidence on the matter of the gift to the son and daughter, as stated by the father is found at II-R. 63 commencing with line 20 and ending with line 17, page 64:

> "Q. At the time that you were talking about the formation of the partnership, or the company that you told me about here—and directing your attention to your son's birthday in September of 1955, his 21st birthday—what was your intention with reference to money that would come in from the balance of the 1955 Rosenberg crop?
>
> A. To use it in '56 as I go along, you know, always do that.
>
> Q. Was it to be used as part of the new company that you were forming?
>
> A. Yes. You need it, as a matter of fact, to run a company anyhow.

Q. Let us ask you this: At the time that you formed this partnership, as you say, with your family, what property did you have to give them? What did you actually give to them?

A. Property?

Q. Yes.

A. I don't give no property to them. *I just give the business, the crops business but not the property, no.*

Q. You gave them an interest in the crops in the business.

A. In the crops in the business."

We now logically come to the question, what were the assets of the "crops business"? This business, of necessity, included the right to the use, control and enjoyment of the land, trees, equipment and buildings used in the operation of the almond farming operation. It is clear from the testimony of the father and the daughter that it also included the Rosenberg Bros. account receivable. The record clearly shows that this capital asset was later paid to the 1956 partnership and the account receivable asset became a cash asset used in the conduct of the 1956 ranch operation to defray its costs.

To say that the Rosenberg account receivable was not an asset of the "crops business" is like stating that the cattle in the *Culbertson* case were not a business asset because the father had operated the ranch alone and therefore at least as to the value of the animals at the date of the creation of that partnership, constituted money earned solely through the efforts of the father. The *Culbertson* case does not so hold.

This is further supported in the record by the testimony of Dolores Donaldson (II-R. 155, commencing at line 11 and ending at line 2, page 156) as follows:

> "Q. Can you tell us any more of the details that were agreed upon, any of the rules of the partnership in connection with the formation of this partnership?
>
> A. Well, it would start in 1956.
>
> Q. What business were you going to be in?
>
> A. Farming.
>
> Q. On the ranch?
>
> A. On the ranch—only on the ranch. *Whatever we took in for '56 would be income for the partnership, and whatever expenses we had, beginning January 1, would be expenses for the partnership.*
>
> Q. Was anything else discussed?
>
> A. No, I don't think so.
>
> Q. Whose land would the partnership use?
>
> A. We wouldn't own any of the land. We would just use it, but we weren't going to gain anything from the land just because we had a partnership with Dad and Mom."

Thus the uncontradicted and unimpeached record discloses that the Rosenberg account receivable which came into existence under an agreement of sale with title to the almonds reserved until final payment, was, like the cattle in the *Culbertson* case, a business asset which was utilized in the conduct of the partnership business.

It is an undeniable fact from the record that the Rosenberg Bros. account receivable was a vital and material part of the "crops business."

II.

1956 RENT ALLOCATION.

The trial Judge concluded that because the 1957 partnership paid rent in an amount equal to 25% of its gross receipts, the 1956 partnership should therefore be surcharged with rent in a similar percentage; there is *no* basis for this in the record. The combined 50% interest of the father and mother was agreed upon because NO RENT was to be paid.

Dolores Donaldson testified on the question of rent as follows (II-R. 156, lines 3 to 11, and 156, line 24 to line 9, 157):

"Q. Was the partnership going to pay any rent?

A. No.

Q. For either the land or the trees or the equipment?

A. No.

Q. Was that discussed and agreed upon?

A. Yes.

Q. Everybody understood it?

A. Oh, yes.

The Court: You already testified that there was no rent to be paid?

The Witness: Yes.

The Court: Tell us as much as you recall of the conversation on that subject.

The Witness: We weren't going to pay any rent, but we were going to operate the ranch and we weren't going to take any ownership of the land just because we had a partnership.

The Court: Was that actually discussed?

The Witness: Yes."

The 1956 partnership *paid no rent* but the net profits were divided *four* ways. The 1957 partnership *paid rent* but the net profits were divided *three* ways and the mother's 25% share of net profits eliminated. It is clearly inferable from the record that the mother's 25% share in 1956 was in lieu of a rental charge (II-R. 162, lines 8 through 25):

"Q. And was that a period of time shortly after—Well, do you know when Mr. Franzman first started talking about having something in writing?

A. In 1956.

Q. And was that done?

A. Yes.

Q. To commence when?

A. 1957.

Q. Were any changes made?

A. Yes.

Q. Will you state what they were, as you recall?

A. *Well, we decided that actually we should just have my dad and my brother and I as partners and not my mother, and that we should pay a rental fee for the use of the property,* which would be 25% as an expense, rental expense.

Then we thought that the shares would be 33⅓ to my father and my brother and myself."

The 1957 agreement increased the taxable income to the parents from 50% of net income to 25% of gross income plus ⅓ of the net profits. However, this increase of the parents' share in 1957 is not a basis for allocation on a "rental theory" in the year 1956.

Here clearly all members of the Ramos family are doing their utmost to be fair and just in their family dealing. The parents are not trying to gain advantage over the children nor the children over the parents.

CONCLUSION

The record in this case undeniably supports the gift to the children of a 25% interest each in the "crops business." The "Rosenberg Account Receivable" was an asset of the "crops business". As a part of a business interest it was transferred to the children who became the owners thereof and constituted an interest in the assets of the partnership which is distributable to the owner of the capital interest upon his withdrawal from the partnership or upon liquidation of the partnership.

The 25% interest of the mother in the 1956 partnership was a distributive share in lieu of rent and the surcharge of 25% of the 1956 partnership gross income as rent is error, either as a rental payment or as a "re-allocation of income."

In concluding this bifurcated brief we assert:

1. That there is abundant, substantial and sufficient evidence to sustain the Court's findings and conclusions that valid partnerships were in existence during the calendar years 1956 and 1957.

2. That there is no basis for any re-allocation of income.

3. That the Rosenberg account receivable was a proper asset of the 1956 crops business and partnership.

4. The Court erred in surcharging the 1956 partnership with 25% of the gross receipts for that year, either as rent or as a re-allocation of income.

Dated, San Rafael, California,
October 17, 1967.

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Attorneys for Appellees and Cross-Appellants.

CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

Dated, San Rafael, California,
October 17, 1967.

JASPER C. DE DOBBELEER,
JEROME A. DUFFY.